RECORDS AND BRIEFS

Supreme Court, U.S.
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No. 04-1702

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN EDWARD FRANKLIN,
Petitioner,
v.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether Franklin made a sufficient showing of actual innocence to warrant the creation of an exception to the provisions of the AEDPA statute of limitations.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brian Edward Franklin is a Texas prison inmate seeking a writ of certiorari to review the opinion and judgment of the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals denied Franklin's petition for certificate of appealability ("COA") from the district court's dismissal of Franklin's federal habeas petition, challenging his conviction for aggravated sexual assault of a child under the age of fourteen, because it was time-barred and not entitled to equitable tolling. In his petition for certiorari, Franklin presents one question relating to the Fifth Circuit's denial of his COA. Because the lower court properly determined that reasonable jurists would not find it debatable that Franklin failed to make a sufficient showing of actual innocence to warrant the creation of an exception to the AEDPA statute of limitations, and such remedies would neither prevent a miscarriage of justice nor alleviate inequity in this case, certiorari should be denied.

STATEMENT OF THE CASE

I. State Proceedings

Franklin was indicted by a Tarrant County, Texas grand jury, for committing aggravated sexual assault against Brandi Rachall, a thirteen-year-old girl. Tr at 3.[1] Franklin pleaded not guilty, and a jury convicted him and assessed a life sentence on February 25, 1995. 7 SF 149; Tr at 3, 209, 219, 224. The Second Court of Appeals affirmed his conviction on October 17, 1996. *Franklin*

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[1] "Tr" refers to the clerk's record from Franklin's trial followed by the relevant page number(s).

"SF" refers to the statement of facts from Franklin's trial, preceded by the relevant volume number and followed by the relevant page number(s).

"SWH" refers to the statement of facts from the evidentiary hearing held on Franklin's application for state writ of habeas corpus, preceded by the relevant volume number and followed by the relevant page number(s).

v. State, No. 2-95-084-CR (Tex. App.– Fort Worth, 1996, pet. ref'd) (not designated for publication). The Court of Criminal Appeals refused his PDR on February 26, 1997. *Franklin v. State*, PDR-157-97 (Tex. Crim. App. 1997).

On May 15, 1998, the Tarrant County District Attorney's Office notified Franklin that Brandi had provided an affidavit to the police on May 5, 1998, swearing that John Guerrero, her stepfather, had been touching her inappropriately since she was six and had been penetrating her vagina with his penis since she was eleven years old, ending on March 1, 1998. *Ex parte Franklin*, Application No. 44,521-01,at 34-35.

On June 8, 1999, over a year after Franklin learned of this new evidence, Franklin filed a state application for writ of habeas corpus, claiming only that he had newly discovered evidence that he was actually innocent of the crime for which he was convicted. *Id.* at 2. The state district court held an evidentiary hearing to resolve controverted, unresolved facts. 1-5 SWH. The state district court entered findings of facts and conclusions of law recommending that relief be granted. Dist. Ct. Order Nov. 5, 2001. The Court of Criminal Appeals remanded the case to the district court to apply the *Herrera v. Collins*, 506 U.S. 390 (1993), standard as interpreted in *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). CCA Order September 12, 2001, at 2-3. The district court entered supplemental and revised conclusions of law recommending that relief be granted. Dist Ct Order November 5, 2001. On April 10, 2002, the Court of Criminal Appeals determined that the district court had failed to properly apply *Elizondo*, reviewed the evidence, and denied Franklin's application for writ of habeas corpus. *Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002).

II. Federal Habeas Proceedings

On September 9, 2003, seventeen months after the Court of Criminal Appeals denied his state writ application, Franklin filed a federal petition for writ of habeas corpus, challenging the state courts' determinations both on direct appeal, regarding his vouching claim, and on state habeas, regarding his actual innocence claim, raising unexhausted claims of perjury, and asserting a substantive claim of actual innocence. *Franklin v. Dretke*, 4:03cv934-Y, D.E. 1 (N.D. Tex.). The magistrate court issued findings, conclusions, and a recommendation ("R&R"), to dismiss the petition with prejudice as time-barred. Franklin objected; the district court adopted the R&R and noted that Franklin failed to make a sufficient showing of actual innocence to overcome the time-bar. D.E. 31, 32 at 2-3. The district court denied Franklin a COA. D.E. 36 at 1.

Further, Judge Clement denied a COA, finding that Franklin had not shown that reasonable jurists would find the district court's resolution debatable or wrong. *Franklin v. Dretke*, No. 04-10641 (5th Cir. Oct. 20, 2004); Pet. App. B. On February 16, 2005, a panel of the court entered an order denying Franklin's motion for reconsideration with one judge dissenting in part. Pet. App. A.[2] The Fifth Circuit denied rehearing *en banc* on March 16, 2005. Pet. App. I.

The Fifth Circuit did not reach the issue of whether a showing of actual innocence could excuse a petitioner from the AEDPA statute of limitations, because it was not debatable that Franklin failed to make a showing of innocence. Pet. App. A.

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[2] Franklin refers to this as a court opinion denying COA, however, it is an Order denying his motion for reconsideration, which does not entail the same standard as determining whether the petitioner is entitled to a COA. However, in denying his motions for reconsideration, the Fifth Circuit implicitly found that his claims would not be debatable by jurists of reason.

Franklin's petition for writ of certiorari followed.

STATEMENT OF THE FACTS

I. Evidence Presented at Trial

A. The Date of the Offense

At the time of the offense, Brandi Rachall, the complainant, was living with her mother, Gena Guerrero, and her stepfather, John Guerrero, with alternating weekend and holiday court-ordered visitation with her father, Matthew Rachall and his girlfriend, Kim Harris. 8 SF 130-132. The assault took place at Rachall's house during one of Brandi's visitations, but she did not remember exactly who was at the house at the time, and she was unable to pinpoint the specific date of the assault, which is common for a child victim of sexual assault regardless of age or intelligence. 8 SF 50, 69-70; 9 SF 90, 149-150. She was able to narrow the time frame to sometime between March 6 and March 18, 1994. 9 SF 149. She realized that it could not have been the day that she initially thought it was, March 5, and Rachall, knew that Franklin had not been at his house on March 5. 8 SF 144; 9 SF 139, 206; 10 SF 43-73.

Rachall had known Franklin for several years, had worked with him on the police force, had found out in December 1993 that Franklin was going through a divorce, and had him over for a small New Year's Eve party. 8 SF 134-137. Starting in January of 1994, Franklin began to follow a routine of bringing his children over to Rachall's house the same weekend that Rachall had visitation, staying anywhere from 10-11 p.m until 1-2 a.m., depending on what they were doing. 8 SF 134-137. There would be times that Rachall had to work on the weekends that Franklin would be present at his home prior to Rachall going to work and would leave when Rachall left for work at 10 p.m. 8 SF 137.

Franklin was working at a loading dock, Mondays through Fridays, typically starting at 6 p.m. and finishing at midnight or after, but the hours fluctuated. 8 SF 148; 10 SF 83, 87-88, 90. Franklin did not work on Saturday or Sunday, March 12th and 13th. 10 SF 87, 92; Defense Exhibit 9.

Rachall had visitation with Brandi and his son the weekend of March the 4th through the 6th. 8 SF 141-143. On Sunday, March 6th, Rachall hosted a birthday party for his son at his house, with approximately fifteen people in attendance, mostly relatives. 8 SF 141-143. Franklin attended this party. 8 SF 144. Rachall took Brandi and his son back to their mother's at 6 p.m. 8 SF 143.

B. Spring Break

Rachall's next visitation began on March 11, and he had visitation for the whole week, because it was spring break. 8 SF 144-145. Rachall worked March 11 through March 14, but took the rest of the week off to spend with his children. 8 SF 145. Rachall conceded that it was possible that Franklin visited his home on March 13, 1994, but did not have specific knowledge of it. 8 SF 148, 190. Michelle Ransom, a CPS worker, testified that both Rachall and Harris said that Franklin had not been to their house since March 6, but neither Rachall nor Harris recalled telling her that. 8 SF 200; 10 SF 33, 118.

Brandi thought that, on the day of the assault, Rachall and Franklin had gone somewhere earlier in the day and came back smelling like marijuana. 9 SF 150-153. Rachall testified that he did smoke marijuana, so it could be true that there was drug use going on. 8 SF 184. When they started talking badly about her mother, Brandi got upset, started crying, and went to her room, where she smashed a toy guitar in anger before she went out into the backyard. 9 SF 153-56. There, she stood by the back fence looking into the woods as the sun went down and it turned from light to dark. 9 SF 153-56. It was cold, chilly. 9 SF 221.

Franklin came outside and asked what she was doing. 9 SF 157-159. She decided to go back inside by going around the side of the house, because she did not want to walk past Franklin. 9 SF 157-159. She was pretty sure that her dad and Kim were inside. 9 SF 163. Rachall described the layout of the backyard and confirmed that one of the gates had been wired shut around Christmas. 8 SF 174-177, 187. Brandi was by the gate, when Franklin grabbed her shoulder from behind causing her to fall to the ground, hitting the back of her head against the house. 9 SF 157-159. Franklin pulled Brandi's jeans down to her ankles, pinned her hands behind her by holding her wrist and told her to just be still or just be quiet. 9 SF 160-161. She tried to scream, but nothing would come out. 9 SF 161. She felt him put his penis inside her vagina, hurting her. 9 SF 161-62. It lasted for four or five minutes before he got up and walked over to the fence where she thought he might have been masturbating, seeing his hands moving like he was shaking something in front of him, but his back was to her. 9 SF 161-62. He went back inside, and she picked herself off the ground, brushed leaves off her and walked to the porch where she waited until he left to go back inside, about fifteen minutes. 9 SF 162-163.

Brandi said that she had never dated a boy and had not really been interested in dating. 9 SF 137. She also testified that she had never had sex before. 9 SF 161. Rachall had not seen any bruises, scratches or abrasions that were unusual on Brandi during the month of March. 8 SF 211-212.

When Brandi went back inside, she got a Coke and a bottle of aspirin and walked behind the couch where Kim was sitting watching TV, into her room. 9 SF 164. She listened to music, was in pain, took up to nine aspirin, did not know what to do, and did not sleep. 9 SF 165-66.

The next morning Brandi took a shower and noticed blood on her underwear, which she put in her bag. 9 SF 167. She also

called her mother; she wanted to go home, but she did not want to tell her mother what happened, so she stayed. 9 SF 168-69. Gena Guerrero, Brandi's mother, testified that Brandi called her several times on Monday, March 14, 1994, and that it was unusual for her children to call her when they were with their father, even to tell her they would be late, although they did that on rare occasion. 9 SF 13-15. She said it seemed like Brandi just needed to hear her mother's voice. 9 SF 13-15.

On Thursday, March 17, Rachall, who was under the impression that Franklin and his children would be visiting that week because of spring break, realized that he had not seen Franklin that week and drove his family by Franklin's apartment while they were in that part of town to see what was going on. 8 SF 149-150. Rachall and Harris both remembered that Brandi refused to come inside, that she appeared upset and was adamant about not even getting out of the car. 8 SF 151; 10 SF 40. Brandi did not want to see him. 9 SF 170.

On Friday, Rachall, his family, and a neighborhood friend named Evan, who was 14 years old at the time, headed out on a camping trip, but the car broke down and Rachall had to transport everyone back to the house, one by one, on his motorcycle, Brandi being the first one back to the house. 8 SF 155. While she was at the house alone, Brandi called Mrs. Mancel and told her she was afraid, but did not tell her about the assault. 9 SF 173. Rachall testified that they fixed the car, but did not leave until the next morning, so everyone stayed overnight at the house, including Evan. 8 SF 156-57.

On Saturday, they left for their camping trip. 8 SF 156-57. Brandi and Evan slept in the car on the camping trip. 8 SF 158. Brandi said that she did not tell Evan about the assault because Evan was just some kid who hung around the house a lot and they were not that good of friends. 9 SF 178. On Sunday, March 20, Rachall took Brandi home late, around 9 p.m. 8 SF 157-59.

Monday morning, Gena Guerrero did laundry and found a pair of underwear stained with bright-red blood in Brandi's bag. 9 SF 18-19, 49, 52. She testified that the blood was brighter red than normal spotting and that Brandi had just had her period two weeks earlier. 9 SF 18-19. Constance Patton, a forensic serologist with Tarrant County Medical Examiner's Office, testified that within six to eight hours the color of blood would turn a dark red to brownish color. 10 SF 75-81. She also testified that one cannot visually tell the difference between menstrual blood and other blood. 10 SF 79. She conceded that description of color is subjective. 10 SF 80.

Rachall's next visitation was the weekend of April 1st through the 3rd. 8 SF 159. Brandi told her mother that she did not want to go, which was the first time that had ever happened, but she went anyway. 9 SF 20. Brandi did not want to go, because she did not want to see Franklin who was always over there. 9 SF 180. Rachall did not think that Franklin visited his home that weekend. 8 SF 159. Rachall noticed that Brandi did not sleep in her room, but in the living room where Kim was, but he figured they had fallen asleep watching television. 8 SF 160.

On Wednesday, April the 6th, Rachall exercised his Wednesday visitation, which he did not usually do. 9 SF 180-81; 9 SF 54-55. When she returned, Brandi was sick, did not feel good, was upset, and complained to her mother that her father had given her a hard time about not wanting to go to Evan's birthday party that night, suggesting that she should go even when she did not want to. 9 SF 55-56, 182. They had gone to dinner instead. 9 SF 21. Rachall testified that he did not recall having visitation on April 12th or on any weekday during the month of April. 8 SF 210-11. Gena Guerrero testified that Rachall never had visitation on a Tuesday. 9 SF 21.

C. The Outcry

On April 13, 1994, a few minutes after 3 p.m. Brandi came into Jean Mancel's classroom, during her planning period, when no one else was in the room, looking very subdued, very serious, and sad. 8 SF 85. Mrs. Mancel talked with Brandi for about 45 minutes, Brandi made her promise not to tell, and then conveyed information to her about having been sexually assaulted. 8 SF 85-88. Both Mrs. Mancel and Brandi were crying. 8 SF 86-87. Mrs. Mancel encouraged Brandi to tell her mother, but she was afraid to. 8 SF 88. Brandi had not planned on telling Mrs. Mancel about the assault. 9 SF 183-84. Mrs. Mancel did not write down any of the information Brandi had conveyed on the day that she conveyed it. 8 SF 89.

D. Mrs. Mancel's Report to CPS

On April 16, 1994, the day before Mrs. Mancel's wedding, she spoke with a therapist friend about Brandi's outcry, and he helped her call CPS to report it, holding the phone and dialing the numbers for her, reminding her to breathe while she was crying. 8 SF 90-94. Her report to CPS stated that Brandi was raped by one of her father's friends on April 12, 1994, a Tuesday night, and her father allowed his friend to rape Brandi because it was his birthday, while her father and the woman he lives with, Kim, were in the other room. 8 SF 117-119. It says that Brandi was raped twice, once in her room and once outside in the backyard when she tried to run. 8 SF 117-118. The report said that Brandi told her mother on April 13, 1994, but that her mother did not believe her, thought that Brandi probably brought the incident upon herself, and called her a slut. 8 SF 118-119. The report said that the perpetrator covered Brandi's mouth to keep her from yelling, and that she broke her guitar when she hit him with it. 8 SF 119. Brandi was supposed to have visitation with her father the next weekend, but doesn't know if she would be going. 8 SF 119. Gena Guerro testified that she had never called her daughter a slut or said that she did not believe her. 9 SF 60, 63.

Jim Wilson, an intake worker for CPS, testified that he enters information into the report as the informant provides it, but it is common for informants to have the information wrong. 10 SF 7-17. Turner agreed that people making the reports are often upset, which may contribute to inaccuracy in the intake reports. 8 SF 217-218. She also agreed that delayed outcries are common and that children have difficulty pinpointing dates. 8 SF 217-218.

E. CPS & the Police

Rachall's next visitation began on April 15th. 8 SF 160-161. Betty Turner, a CPS worker, said that Brandi's case was high priority, meaning that CPS had to respond within twenty-four hours, because there was an indication that the parents were not protective. 8 SF 221-25. John McCaskill, a detective with the Fort Worth Police, who went to the police academy with Franklin, became involved in the investigation on April 16th over dispatch and went to see Gena. 9 SF 70-75. CPS was not there yet, but the officers went to Rachall's house when they learned Brandi was there on visitation, because they were concerned about her safety. 9 SF 75. Rachall was not at home, so they returned to Gena's house and were met by the CPS workers. 9 SF 76. Turner testified that Brandi's mother was tearful and upset that it had happened and that Brandi had not come to her. 8 SF 225. She also testified that Brandi's stepfather was hurt that Brandi would not have come to him because he was really comfortable talking with her about sexuality. 8 SF 226. Neither seemed to have known. 8 SF 226.

The CPS workers and officers then went to Rachell's house. 8 SF 160-161. Turner testified that Kim immediately assumed Brandi's mother had made something up. 8 SF 228. Rachall did not remember thinking that his ex-wife would have been causing trouble. 8 SF 163-64. When she saw CPS, Brandi thought "oh my gosh, she told." 9 SF 186. Turner testified that she saw Brandi crying. 8 SF 230. Brandi did not tell CPS about the assault, because she did not want her father to know. 9 SF 188. She could hear him blaming her mother, so she went along with that. 9 SF

188. At the time, Turner only told Rachall that the allegations involved sexual abuse. 8 SF 238-39. Rachall was told that the children were not safe at his house and he had to take them home. 8 SF 163. He drove Brandi and her brother home. 8 SF 163.

After Brandi came home on April 16th, Brandi told her mother what happened. 9 SF 23-24. Her mother called Detective Warren and conveyed what Brandi had told her, then she called Rachall to let him know. 9 SF 23-24. Gena Guerrero was not surprised by the identity of the perpetrator. 9 SF 65.

F. The Phone Call

After CPS had been to Rachall's house, Franklin dropped in with his children, and Rachall told him what had happened. 8 SF 18-23; 10 SF 18-23. Franklin agreed that Rachall's ex-wife was starting trouble. 8 SF 166. Around midnight, Gena called and talked to Harris, who told Rachall to get on the other line. 8 SF 166-168. Gena told them that Franklin had raped Brandi. *Id.* Harris began to say very loudly "Oh my God," and "He's here right now." 8 SF 168. After telling Harris to calm down, Rachall went to Harris, who was standing just outside the backdoor, and saw Franklin listening at the door. 8 SF 169. When Franklin saw Rachall, he looked surprised, like he didn't know what to do or say. 8 SF 169-170. He froze for just a second, then said "I guess I better go." *Id.* He picked up his children, and went out the door without asking what was wrong or what was going on. *Id.*

G. Police Interview

On April 17th, Officer McCaskill took Brandi's statement. 9 SF 78. Brandi's mother and stepfather were with her, but they were not in the room when he took the statement. 9 SF 27, 78. McCaskill had been with crimes against children for only a few months without any special training prior to taking Brandi's statement. 9 SF 92. He did not have any paperwork or reports of any account of what had occurred. 9 SF 81. He took her statement and asked her more detailed questions. *Id.* In

answering his questions, Brandi was consistent and became emotional several times. *Id.* To his knowledge, there was no inconsistent report other than the one provided by the teacher to CPS. 9 SF 119. He did not know about an offense report by Chief Haenes with an offense date of March 5th. 9 SF 124.

H. Sexual Assault Examination

Brandi's mother, stepfather, and a CPS worker, Ransom, were with Brandi when Dr. Jan Lamb, doctor of pediatrics, examined Brandi. 8 SF 45; 9 SF 191. Dr. Lamb said that because she was not the outcry witness, she did not interview Brandi as extensively as she otherwise would have, but that it was important to know what had happened in order to take a medical history and make a diagnosis. 8 SF 45-49. She testified that Brandi told her that she was raped by Brian Franklin, a friend of her father's, in March of 1994. 8 SF 45-49. Brandi told her that Franklin had put his penis inside her, but that she did not think that he ejaculated inside of her; rather, she saw him ejaculate as he masturbated after the assault. 8 SF 51. Dr. Lamb testified that Brandi appeared very frightened and reluctant to talk, which is common. 8 SF 52.

Dr. Lamb testified that she found tears in Brandi's hymen at the positions of both 6 o'clock and 11 o'clock, that the hymen tends to rupture more frequently between three and nine o'clock than above, so that the rupture at 11 o'clock was indicative of blunt force, penetrating trauma. 8 SF 56, 59-60. Such injuries would be consistent with pain and the victim bleeding at the time of the offense. 8 SF 60-61. She testified that out of 450 girls she had evaluated in Fort Worth, she had only found injuries like this in two or three, injuries which she would characterize as dramatic. 8 SF 61-62. She testified that blunt force trauma itself is not evidence of rape, but of intercourse, penetration, whether it is forcible or consensual. 8 SF 74-76.

I. Mrs. Mancel's Written Statement

On April 20, 1994, Mrs. Mancel typed out a statement at the request of Chief Haenes, from memory, without assistance or being able to see what she had told CPS. 8 SF 93-96. She was upset while she was typing it, because she did not know that she would have to go through it again. 8 SF 97. She also had had trouble with her memory of details, and was on muscle relaxer and some other medications at the time. 8 SF 97-98. She had done her best to remember what Brandi told her. 8 SF 98-102.

The written statement Mrs. Mancel provided said that she spoke with Brandi around 10:15 a.m. on April 13, 1994, when Brandi came to her classroom to discuss a big problem. 8 SF 120-121. Brandi explained that her father was supposed to have her on Wednesday, but he had called and asked her mom if she could come on Tuesday instead. *Id.* The reason for this change was that it was Brian Forester's birthday, a friend of her father's, and her father was throwing a birthday party for him. *Id.* Mrs. Mancel's statement went on to say that Brian kept bothering Brandi, doing suggestive things to her, so she went to her room to get away from him after the partygoers began taking drugs, Franklin had then come to her bedroom, asked when he was going to get his birthday present, and proceeded to attack her. 8 SF 122-123. According to Mrs Mancel's statement, Brandi screamed but nobody cared. 8 SF 123. She broke her guitar hitting him with it and managed to get outside and over the fence using a trash can, but he met her on the other side and raped her outside in the yard, covering her mouth with his hand so hard that she had a sore jaw. *Id.* The statement also detailed how he had been bothering her for some time, for instance when her dad and his friends rode their motorcycles to Waco. 8 SF 122. To Rachall's knowledge, Franklin did not have a motorcycle, and Rachall had never seen Brandi on a motorcycle with Franklin. 8 SF 211.

At trial, Mrs. Mancel recalled that Brandi told her that a man by the first name of Brian had raped her, but she could not recall

the last name, that it occurred at her father's house, that drugs were involved, that he attacked her in her bedroom and raped her in the backyard. 8 SF 103-105. She remembered having a conversation in May with someone, telling them that she had become somewhat confused when pressed to provide details, because her main focus was on the fact that Brandi had been hurt. 8 SF 105-106.

J. Aftermath

Brandi was in the top percentile of her class. 9 SF 8. Her mother thought that she was a perfect child. 9 SF 8. Brandi was thoughtful and considerate, had an overwhelming sense of right and wrong, and was a border-line perfectionist. 9 SF 9. Since the assault, Brandi had attended counseling, began wearing baggy clothing, stopped playing outside, become terrified about going into the backyard and reluctant to sleep in her bedroom, and began having nightmare. 9 SF 27-29.

II. Evidence Presented at State Writ Evidentiary Hearing

At the evidentiary hearing, Franklin called Matthew Rachall, Constance Patton, and Dr. Lamb, all of whom had testified at his trial, as well as Rose Anna Salinas, one of the prosecutors at his trial, Eric Joseph Holden, who had conducted a polygraph examination pre-trial, and Brian Franklin, the petitioner. The State called Brandi Rachall.

Brandi maintained that all of her answers were truthful at trial except her response to the one question whether she had ever had sex before. 4 SWH 125. Franklin did rape her, at her father's, at the side of the house, and it was painful. 4 SWH 124-26. When she lied at trial, she was thinking that her stepfather was right outside, she was scared of him, he was always with her, and she did not feel that she could tell anyone what had happened. 4 SWH 126-27, 130-33. Furthermore, her stepfather was physically abusive to her mother and others in the house. 4 SWH 129-30.

When she told him about Franklin's assault, he was mad and said it was her fault. 4 SWH 133. She confirmed the details of the sexual abuse that she had provided in her affidavit. 4 SWH 137-140. She also testified that her stepfather told her to make sure to clean up any blood evidence of his abuse, but that she only found blood two or three times and there was never as much as there was when she was assaulted by Franklin. 4 SWH 154-158.

Brandi did not remember anyone specifically asking if she had previously had sex until trial, not the police, CPS, or Dr. Lamb. 4 SWH 145-48. If Dr. Lamb asked her, then she said no, but she didn't remember her asking. 4 SWH 170. Brandi did not think that her failure to disclose would interfere, because she had made excuses to keep her stepfather from raping her after spring break and knew she had not had sex since the assault. 4 SWH 143, 171-72. She said that telling the jurors that she had not had sex did not change the fact that Franklin had assaulted her. 4 SWH 169.

Brandi did not have trouble sleeping until Franklin raped her. 4 SWH 167. Her nightmares were only about Franklin's assault. 4 SWH 167. Her stepfather's abuse troubled her, but it was different. 4 SWH 167. She did not seek counseling regarding her stepfather's abuse and had not told the counselor she was seeing after Franklin's assault about her stepfather's abuse. 4 SWH 164, 166. She did not tell anyone about her stepfather's abuse until 1998, and continued to lie about it to her aunt until1998 when she went to live with her while her mother was getting divorced. 4 SWH 148, 174-75.

Brandi did not tell Mrs. Mancel that she was to be Franklin's birthday present, or that her mother called her a slut, but acknowledged that she lied about her sexual history to anyone who asked and did so because she felt her stepfather would harm her if she did not continue to cover it up. 4 SWH 176-77.

The prosecutor testified that Brandi's sexual history was one of the most important factors in evaluating how to present the case, what evidence to introduce. 3 SWH 3, 36. She found Brandi to be so credible that she believed her even when faced with the results of Franklin's polygraph examination. 3 SWH 47. She acknowledged that her evaluation of the case was also influenced by evidence of Franklin's prior inappropriate sexual history which had been properly excluded as evidence. 3 SWH 47. She testified that, had she known that Brandi was also being sexually abused by her stepfather, she would not have been able to introduce the medical evidence, pointing out that Dr. Lamb did not have any information about the additional sexual abuse. 3 SWH 19, 32. The prosecutor said that based upon her interviews with Brandi, she was not afraid to ask whether she had had sex before, and wanted to establish she was sexually naive. 3 SWH 26.

If the prosecutor had found out about the perjury in the middle of trial, there is a strong possibility that she would have moved to dismiss the case. 3 SWH 37, 71. She believes that she used evidence that the prosecution would not have been entitled to use if the additional abuse had been known, and that the use of such evidence affected the integrity of the jury verdict and deprived Franklin of a fair trial. 3 SWH 38, 68, 70. The prosecutor was not saying that she believed Franklin was innocent. 3 SWH 46, 62.

The prosecutor acknowledged that the majority of the cases she tried were without medical testimony and she had gotten convictions on every case except one. 3 SWH 34, 39. In Franklin's case, the existence of another perpetrator would not have prevented her from prosecuting the case without the medical evidence, if she had found Brandi credible, because there was other evidence directly linking the assault to Franklin. 3 SWH 45-6. She testified that if Brandi had disclosed the abuse, she would have prosecuted the case. 3 SWH 46.

The prosecutor said she was not sure if she could find Brandi credible after her perjury. 3 SWH 73-74. However, she acknowledged that she had not spoken to Brandi since finding out about her perjury to reevaluate her credibility. 3 SWH 73-74. She said that, if it had it come out at trial, she would have sat down to reevaluate the case and if she had found Brandi credible would have determined if there was a way to proceed with the prosecution. 3 SWH 73-74.

Dr. Lamb testified that her physical findings would have been the same, but if she had known about the additional ongoing abuse, she would have said the findings were consistent with blunt force trauma instead of consistent with history. 5 SWH 9-10, 20. She testified that her findings are still consistent with the allegations, and also consistent with ongoing sexual abuse. 5 SWH 14-20. Brandi's two allegations do not invalidate each other. 5 SWH 20. Dr. Lamb could not say what caused the injuries, nor did she say in her previous testimony; she never ascribed the physical findings solely to Franklin. 5 SWH 14. Dr. Lamb did not ask Brandi about any other sexual abuse. 5 SWH 26.

Dr. Lamb found Brandi's statements to be credible then, and learning that she was also abused by her stepfather did not change her assessment that Brandi was credible. 5 SWH 31. She was not surprised that Brandi did not disclose the abuse. 5 SWH 21. Most women do not disclose their sexual assaults, neither do children. 5 SWH 29. Furthermore, it is common even when disclosing one part of abuse to withhold others, depending on the fallout. 5 SWH 29. Domestic abuse is present in sixty-one to sixty-five percent of documented sexual abuse cases. 5 SWH 30. Children who have been sexually victimized are much more easily revictimzed. 5 SWH 31. Sometimes sexually abused children do not even consider the abuse to be sex. 5 SWH 33. She said you have to look at the context in which Brandi testified that she had not had sex. 5 SWH 33. Dr. Lamb did acknowledge that false claims of

abuse are more common in adolescence than in younger children and are more common where the child is in a chaotic situation, such as unstable divorce. 5 SWH 22.

Rachall confirmed that he did not remember seeing Franklin at his house on March the 11th through the 13th, but could not say for sure whether he was or was not there. 4 SWH 27, 34, 46. Rachall did not remember that it rained that weekend. 4 SWH 35. Rachall also testified that it took about 45 minutes to drive from his house to Franklin's house. 4 SWH 41.

Patton, the medical examiner who had testified about the color of blood at trial, testified that a stain a week old would definitely be brownish color. 4 SWH 52, 56, 58. She also said that, as described, the blood would have been put on the panties within the past twenty-four hour time period. 4 SWH 56-57.

Franklin testified that he had never had any sexual contact with Brandi. 4 SWH 61. He testified that it rained both March 12th and 13th, pointed to the State's trial exhibit 14 weather report showing that there was precipitation both days, and said Rachall's backyard would have been muddy all weekend.[3] 4 SWH 72-73.

On March 12th, Franklin took his children to Kroger, making a purchase at 3:28 p.m., and then to Target, purchasing something at 4:45 p.m., then back to his apartment to cook dinner, watch TV, and work out in the weight room. 4 SWH 75, 79-80. On Sunday, he took his children to Eckerds, got gas at Texaco, went to Hulen Mall where he made a purchase from the GNC at 3:31 p.m., and then played in some toy stores. 4 SWH 83-85. On Sunday he also worked out and went to the hot tub at his complex. 4 SWH 92. He testified that he did not go to Rachall's house. 4 SWH 85. He doesn't remember if he saw his girlfriend that weekend or not. 4

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[3] State's Exhibit 14 shows that on March 12th there was .05 total precipitation and on March 13th .20 total precipitation.

SWH 89. He did not remember Rachall coming by his apartment complex on March 17th. 4 SWH 104. Shannon was his babysitter on Friday night and that whole week, but he did not know her last name and could not locate her. 4 SWH 88. He would leave to work around 5:20 p.m. and get home past midnight. 4 SWH 107. He testified that he was positive that the only day in March that he was at Rachall's house was on the 6th. 4 SWH 110.

Holden testified about the pre-trial polygraph test that he had conducted on Franklin, which yielded a non-deceptive result, and how the questions he asked, based on an erroneous offense date, reduced the level of confidence in the results. 3 SWH 86-110. He also testified as to the possible admissibility of such evidence at trial. 3 SWH 86-110.

ARGUMENT

I. The Supreme Court need not grant certiorari because Franklin failed to make a showing of actual innocence and therefore the Fifth Circuit's denial of COA is not in conflict with any other Circuit.

Franklin failed to make a showing of actual innocence. No Circuit has held that a mere claim of actual innocence, as opposed to a showing of actual innocence, allows a federal habeas court to review the merits of an otherwise time-barred constitutional claim. Because these conclusions are not debatable by jurists of reason, the Fifth Circuit did not err in denying a COA, and this Court should not grant certiorari.

A COA may be issued only if Franklin "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court's dismissal is on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that

jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A COA requires more than the absence of frivolity or the existence of mere "good faith" on the petitioner's part. *Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003). The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. *Id.* at 336.

Under *Schlup*, if a habeas petitioner presents new evidence of innocence showing that a constitutional violation has probably resulted in the conviction of one who is actually innocent, the federal court may address the merits of his otherwise procedurally defaulted constitutional claims. *Schlup v. Delo*, 513 U.S. 298, 314, 316 ,327 (1995).[4] To demonstrate the requisite probability, the petitioner must show, not merely that a reasonable juror could find that reasonable doubt exists in light of the new evidence, but that "it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt in light of the new evidence." *Id.* at 327, 329.

However, for this Court's hypothetical *Herrera*-type innocence claim, which is itself a substantive constitutional claim, the Court determined that it would be appropriate to apply an extraordinarily high standard of review. *Id.* at 314-15, *citing Herrera v. Collins*, 506 U.S. at 419, 426.[5] This Court suggested that "a *Herrera*-type

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[4] Franklin failed to argue the merits of any underlying constitutional claim in his petition for writ of certiorari or in his petition for COA before the district court. Therefore, Franklin has waived any such claim. Thus, Franklin is not asserting a *Schlup*-type gateway claim to reach the merits of an underlying claim of constitutional error.

[5] This Court assumed in *Herrera* that a truly persuasive demonstration of "actual innocence" made after trial would warrant federal habeas relief if there were no state avenue open to process such a claim. *Schlup v. Delo*, 513 U.S. at 314 fn 28, *citing Herrera v. Collins*, 506 U.S. at 417; *Graves v.*

claim would have to fail unless the federal habeas court itself was convinced that those new facts unquestionably establish the petitioner's innocence." *Schlup v. Delo*, 513 U.S. at 317. This has been interpreted as imposing a "clear and convincing" standard. *Ex parte Elizondo*, 947 S.W.2d at 209.

What evidence the court reviews in assessing the petitioner's showing of innocence depends on whether the actual innocence claim is a gateway to the merits of a substantive constitutional claim and what new evidence is relevant to that claim, because it is the constitutional violation regarding that evidence which petitioner claims resulted in the conviction of one who is actually innocent.[6] The reviewing court must determine that the petitioner

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Cockrell, 351 F.3d 143, 151 (5th Cir. 2003), *cert. denied*, 541 U.S. 1057 (2004) (even if actual innocence claim could be basis for federal relief, only cognizable if there was no state procedure available for making claim). Texas habeas law recognizes claims of actual innocence. *Ex parte Elizondo*, 947 S.W.2d at 205. Franklin's *Herrera*-type innocence claim was reviewed and denied on state habeas. *Ex parte Franklin*, 44,521-01, at cover. Therefore, the Fifth Circuit's denial of COA was proper, because no reasonable jurist would find it debatable that Franklin had failed to state a valid claim of the denial of a constitutional right when the only claim he preserved was his noncognizable *Herrera*-type innocence claim.

[6] In all of the cases cited by Franklin for the proposition that evidence is only required to be newly presented, not newly discovered, the newly presented evidence the courts considered were relevant to the petitioner's underlying constitutional claim. *Schlup v. Delo*, 513 U.S. at 315, 324, 328, 331 (considered testimony of witnesses petitioner claimed counsel was ineffective for failing to call); *Calderon v. Thompson*, 523 U.S. 538, 549, 558, 562, 566 (1998) (considered additional impeachment evidence on underlying claim of ineffective assistance of counsel); *Souter v. Jones*, 395 F.3d 577, 583 (6th Cir. 2005) (considered evidence from bottle manufacturer, photos not introduced at trial, and affidavits reflecting altered opinions of expert witnesses based on that new information on ineffective assistance of counsel claim); *United States v. Davies*, 394 F.3d 182, 185, 191 (3rd Cir. 2005) (considered postconviction legal decisions "holding that a substantive criminal statute does not reach his conduct." on insufficient evidence claim); *Gomez v. Jaimet*, 350 F.3d 673, 679-680 fn 2 (9th Cir. 2003) (considered evidence petitioner claimed counsel was

has presented some new evidence of innocence, without which, "even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Schlup v. Delo*, 513 U.S. at 316. Such evidence of innocence could be "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - - that was not presented at trial." *Id.* at 324. The reviewing court, "not bound by the rules of admissibility that would govern at trial," may "consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.* at 327-28. The new evidence may "call into question the credibility of the witnesses presented at trial" and "the habeas court may have to make credibility assessments." *Id.* at 330.

The Fifth Circuit found that "Franklin has not shown that reasonable jurists would find the district court's resolution of his claim debatable or wrong," and denied his request for COA. Pet. App. B. Both panel and *en banc* reconsideration were denied. Pet. Apps. A, I. Therefore, the Fifth Circuit explicitly found that jurists of reason would not find it debatable whether Franklin had shown that no reasonable juror would find him guilty beyond a reasonable doubt in light of his newly discovered evidence.

Brandi's new testimony that she had been sexually abused by her stepfather, including penetration, prior to Franklin's assault directly impeaches her testimony that she had never before had

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ineffective for failing to present); *Griffin v. Johnson*, 350 F.3d 956, 960, 965 9th Cir. 2003), *cert. denied* 541 U.S. 998 (2004) (considered evidence relevant o ineffective assistance of counsel claim); *Nance v. Norris*, 392 F.3d 284, 291 8th Cir. 2004), *cert. denied* 126 S.Ct. 133 (2005) (no evidence was provided hat supported petitioner's assertions or any evidence petitioner claimed counsel vas ineffective for failing to discover and introduce); *Gandarela v. Johnson*, 286 F.3d 1080, 1082 (9th Cir. 2002), *cert. denied* 537 U.S. 1117 (2003) considered affidavits from potential impeachment witnesses on violation of confrontation clause).

sex. 9 SF 161. However, it did not directly affect the medical evidence, which Dr. Lamb testified remains consistent with Brandi's testimony of Franklin's assault. 5 SWH 9-10, 20. Dr. Lamb testified that she could not ascribe a cause for Brandi's injuries, but pointed out that she had never ascribed a cause for Brandi's injuries; she merely testified that they were consistent with blunt force trauma. 5 SWH 14. Therefore, Brandi's new testimony does not undermine the factual possibility that Franklin assaulted her.

Nor did any other evidence Franklin presented establish that the offense was factually impossible. Rachall could not testify that Franklin was not at his house March the 11th through the 13th, 1994, only that he did not remember. 4 SWH 27, 34, 46. The medical examiner's testimony did not factually preclude the assault, as the subjective nature of the description of the stain was noted. 4 SWH 58; 10 SWH 80. The testimony did not Franklin's receipts, bills, and employment time sheets also do not establish that Franklin was not at Rachall's house on those days as the sun was setting. 4 SWH 75, 79-80, 83-85, 92. Neither is the polygraph test conclusive. 3 SWH86-110. Furthermore, a reasonable juror might remain skeptical of the results of such a test. Moreover, the relevant portions of Franklin's own testimony, while conclusive if taken at face value, are self-serving and uncorroborated, and a reasonable juror might certainly find it lacking credibility. It cannot be said that it is clear and convincing, or more likely than not, that no reasonable juror would find Franklin guilty beyond a reasonable doubt by concluding that his testimony was not credible.

Although Brandi's conflicting testimony regarding her sexual history may call into question her credibility in general, it is not a question that is necessarily resolved against her. The prosecutor conceded that, if she had discovered the information during trial, she would have had to reevaluate Brandi's credibility, and if she still found her credible, would have determined how best to

roceed. 3 SWH 73. Dr. Lamb testified that Brandi's late isclosure, contradicting her earlier testimony, did not undermine r. Lamb's evaluation of Brandi's credibility regarding her legations that Franklin assaulted her. 5 SWH 21. She indicated at it was normal for children of abuse to not disclose the abuse id even that victims of sexual abuse often do not consider the buse to be sex, as sex can carry a voluntary connotation. 5 SWH 3, 33. Therefore, it is at least more likely than not that some asonable juror would resolve the issue in favor of Brandi's edibility.

The credibility of Brandi's allegations against Franklin is also pported by circumstantial evidence which is not explained by e newly disclosed ongoing abuse by her stepfather. Brandi illed her mother the Monday of spring break, which was highly nusual when she was on visitation. 9 SF 13-15. Franklin eached his habit, and Rachall's expectations, of visiting Rachall hen they both had visitation during spring break. 8 SF 149-50. randi refused to get out of the car when they stopped by anklin's apartment the Thursday of spring break. 8 SF 151; 10 : 40. Brandi expressed, for the first time ever, a desire to not sit her father the very next visitation in early April. 9 SF 20, 0. Brandi did not sleep in her room at her father's house, hough she did go to visit. 8 SF 160. Brandi began wearing ggy clothing, stopped playing outside, became terrified about ing into the backyard, and began having nightmares. 9 SF 27-

In virtually every trial, jurors are faced with impeachment idence that they must weigh in making credibility terminations. Provided with general information about victims sexual abuse, as well as Brandi's testimony regarding the asons for her continued withholding, and the circumstantial idence supporting Brandi's allegations, it could not be said that was shown to be clear and convincing, or even more likely than t, that no reasonable juror would find her allegations against

Franklin credible and find Franklin guilty beyond a reasonable doubt.

None of the cases cited by Franklin would cause reasonable jurists to find it debatable whether Franklin had shown innocence. Even considering all of the evidence Franklin has presented, including that which he could have, but chose not to introduce at trial, Franklin has not made a *showing* of innocence.

Furthermore, all of the cases cited by Franklin, in which relief was granted, involved affirmative evidence of innocence, in some cases impeachment evidence, which struck at witness testimony regarding elements of the offense.[7] However, "speculative and *collateral* impeachment falls far short of showing actual innocence." *Gandarela v. Johnson*, 286 F.3d at 1086 (emphasis

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[7] *Schlup v. Delo*, 513 U.S. at 331 (found sufficient, witness statements stating petitioner was not involved in the offense and providing information casting doubt on factual possibility of his participation); *Souter v. Jones*, 395 F.3d at 583 (found sufficient, evidence bearing directly on factual possibility of petitioner causing the injuries with the proposed murder weapon); *Carriger v. Stewart*, 132 F.3d 463 at 468 (9th Cir. 1997) (found sufficient, not for *Herrera*, but for *Schlup*, confession of crime by State's key witness, petitioner's former prison acquaintance and contact with whom petitioner had been staying after he was released from a previous incarceration, a regular yet unreliable informant for the police, and the informant in the robbery and murder investigation which led to petitioner's conviction); *Lewis v. Erickson*, 946 F.2d 1361, 1362-63 (8th Cir. 1991) (granted relief pre-*Herrera* based on complainant's recantation, in a co-defendant's trial, of her testimony that there was no doubt in her mind that the defendant had attacked her, when at petitioner's trial she had not distinguished between her ability to identify the two perpetrators, recantation bore on both witness's credibility and directly on defendant's guilt); *Richter v. Bartee*, 973 F.Supp 1118, 1130 (D. Neb. 1997) (found sufficient, evidence that complainant had made a strikingly similar allegation of sexual assault a year later which had been affirmatively discovered to be false, and medical testimony regarding the complainant's personality disorder stating that it would have affected her at the time she made allegations against petitioner); *but see Gandarela v. Johnson*, 286 F.3d at 1086 (found insufficient, affidavits of possible witnesses regarding possible motivating factors for the accusations made by the complainant and evidence of her general character for truthfulness).

added). Thus, while credibility determinations may well be determinative of guilt or innocence, Franklin has not demonstrated that it is debatable whether Brandi's testimony on a collateral matter, such as whether she had previously had sex, an issue which is generally not admissible at a trial for sexual assault, Texas Rule of Evidence 412(b), would provide clear and convincing evidence, or even make it more likely than not, that no reasonable juror would find guilt beyond a reasonable doubt. The fact that Dr. Lamb does not find Brandi's credibility regarding Franklin's assault to be undermined, exposes the unreasonableness of any such argument. 5 SWH 31. Based on the research to which Dr. Lamb referred, it is more likely than not that at least some reasonable jurors would likewise find Brandi's allegations of Franklin's assault credible even in light of Franklin's new evidence.

Franklin failed to make a showing of innocence about which reasonable jurists would debate whether he had demonstrated that it was clear and convincing, or even just more likely than not, that no juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict. *Schlup v. Delo*, 513 U.S. at 331. Further, no Circuit has held that a mere allegation of innocence, as opposed to a showing of innocence, is sufficient to excuse a petitioner from the AEDPA time limitations for filing a federal petition. Therefore, the Fifth Circuit's denial of COA was proper and did not create a conflict amongst the Circuits. This Court should not grant certiorari.

I. The Supreme Court need not grant certiorari because Franklin should not be excused from failing to file within the one-year AEDPA limitations period under any innocence exception.

Even if this Court is inclined to address the issue of whether there is an actual innocence exception for an otherwise time-barred claim, this is not the case in which recognizing such an exception

would prevent a miscarriage of justice or alleviate inequity. Any exception to the AEDPA limitations must require some degree of diligence. Franklin's complete lack of respect for, and lack of diligence to comply with, the AEDPA limitations renders this case further inappropriate for equitable remedies. Furthermore, the Fifth Circuit did not reach this issue. Therefore, this Court should not grant certiorari.

Under the AEDPA, the limitations period runs from the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence, providing a petitioner who is actually innocent one year in which to bring new evidence of innocence to the federal courts. § 2244(d)(1)(D). Further, if there is some impediment to filing an application, which is created by State action in violation of the Constitution or laws of the United States, the limitations period does not begin to run until such impediment is removed. § 2244(d)(1)(B). Moreover, the one-year period is statutorily tolled while state post-conviction or other collateral review is pending. § 2244(d)(2).

These provisions balance the inmate's interests in proving his innocence, or obtaining a new trial free of constitutional error, against the State's interests in finality and in the ability of the State to retry the case if the petitioner is indeed granted relief. When a petitioner learns of a factual predicate for a claim which he could not, through due diligence, have learned of sooner, it does not matter how stale the State's case or evidence is, the petitioner has one year in which to file a federal habeas petition.

In addition to the provisions of the statute, if a petitioner can demonstrate both "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance has stood in his way," he may be entitled to additional tolling of the limitations period as a matter of equity. *Pace v. Diguglielmo*, 125 S.Ct. 1807, 1814 (2005). Although this Court has never squarely

addressed the question, the Fifth Circuit has applied equitable tolling to the AEDPA's statute of limitations. *Pace v. Diguglielmo*, 125 S.Ct. at 1815 fn 8; *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). Therefore, equitable considerations may toll the limitations period where a situation not envisaged by Congress arises.

However, actual innocence is not a situation Congress failed to consider in drafting the AEDPA. A year after this Court recognized the *Schlup*-gateway innocence claim excusing a procedural default without a showing of cause based on a showing of actual innocence, Congress enacted the AEDPA. Pub. L. No. 104-132, 110 Stat. 1214 (1996). While Congress explicitly provided an actual innocence exception to overcome the prohibition against filing a successive petition and to be entitled to an evidentiary hearing, Congress did not provide for such an exception in the AEDPA statute of limitations. 28 U.S.C. § 2244(b)(2)(B), §2254(e)(2), 2244(d). Furthermore, even where Congress did provide an actual innocence exception, Congress did not make it absolute, but required that the petitioner also be able to demonstrate that the factual predicate for the constitutional claim could not have been discovered previously through the exercise of due diligence. 28 U.S.C. § 2244(b)(2)(B); § 2254(e)(2).

Therefore, even if a petitioner is able to demonstrate a sufficient showing of actual innocence, unless the petitioner is also required to demonstrate that he has been diligently pursuing his remedies, allowing courts to grant relief on an otherwise time-barred claim would eviscerate the statute of limitations. Likewise, even with a showing of actual innocence, without a showing of diligence in attempting to bring the claim within the appropriate limitations period, or some rare and exceptional circumstance preventing such diligence, the petitioner would not have demonstrated that equity demands that his underlying claims be heard.

In this case, Franklin, represented by counsel who was well aware of the AEDPA limitations period, took thirteen months from the time he learned of Brandi's allegations against her stepfather to file his state application for writ of habeas corpus. *Ex parte Franklin*, at 2, 32. Because the limitations period had already expired by the time the state writ was filed, the time that it was pending did not statutorily toll the limitations period. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (where state habeas application not filed until after federal limitation period has run, filing does not toll limitation period). Even after the Court of Criminal Appeals denied his application, instead of immediately filing his federal petition, he delayed another seventeen months. *Ex parte Franklin*, at cover; Fed Writ Pet.

While Franklin claims to have been diligently pursuing his claim by developing additional evidence to support it, mere action does not establish diligence. In this case, Franklin's alleged diligence during the seventeen months after his state writ was denied included conducting additional discovery, investigation, and evidence creation, tangential or irrelevant to his claim of actual innocence based on Brandi's allegations against her stepfather. This action included Franklin submitting to and obtaining the results of a polygraph test and obtaining a juror affidavit, both of which would be inadmissible in federal court. Further, the juror affidavit did not establish that no reasonable juror would have found him guilty beyond a reasonable doubt under any standard; at most it might have demonstrated that a particular juror, viewing the additional evidence without the benefit of an adversarial proceeding and making assumptions based upon that evidence, would not have found him guilty. Franklin's initial action, before filing his state application, also included gathering similar tangential and irrelevant evidence, such as the prosecutor's affidavit and his own receipts and employment time log, which were available but not introduced at trial. This action does not demonstrate diligence in pursuing relief on a legitimate claim, but mere action in manufacturing a claim to

present.

This is not a case in which equity would be served or manifest injustice avoided by excusing the petitioner from his failure to file his federal petition within the time provided by the carefully crafted provisions of the AEDPA. Franklin has not demonstrated any circumstance rendering the one-year limitations period insufficient to bring his claim.

The Supreme Court should not grant certiorari.[8]

CONCLUSION

Because the Fifth Circuit Court of Appeals' denial of COA was proper, no special or important reason for granting certiorari exists. Accordingly, the Director respectfully requests that this Court deny Franklin's petition.

Respectfully submitted,

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[8] Moreover, there is no split amongst the Circuits on this issue, as Franklin claims, because only one Circuit has rendered a decision on the issue. *Souter v. Jones*, 395 F.3d at 580 (found requisite showing of innocence excused time-bar and remanded for consideration of the merits of his underlying constitutional claims); *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003) no innocence claim raised); *United States v. Montano*, 398 F.3d 1276, 1278, 1285 (11th Cir. 2005) (remanded for consideration of innocence); *David v. Hall*, 318 F.3d 343, 347-48 (1st Cir. 2003), *cert. denied* 540 U.S. 815 (2003) failed to make predicate showing of actual innocence); *Rouse v. Lee*, 339 F.3d 238, 251-253 (4th Cir. 2003) (actual innocence claim not raised); *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (failed to make showing of actual innocence).

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In The
Supreme Court of the United States

BRIAN EDWARD FRANKLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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I. This Court should grant Petitioner certiorari because it recently granted certiorari in *House v. Bell*, which raises similar issues.

On June 28, 2005, this Court granted certiorari in *House v. Bell*, 04-8990, on the following two issues:

1. Did the majority below err in applying this Court's decision in *Schlup v. Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial?

2. What constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?

This Court should grant Petitioner certiorari because he raises similar issues. Like House, Petitioner has raised at least a colorable claim of actual innocence. While House contends the lower courts erred in applying *Schlup v. Delo*, 513 U.S. 298 (1995) and *Herrera v. Collins*, 506 U.S. 390 (1993) to determine his innocence, Petitioner argues the lower courts erred in applying *Herrera v. Collins*, 506 U.S. 390 (1993), in determining his actual innocence. Both House and Petitioner raise the issue of what constitutes "actual innocence" under *Herrera*.

Respondent at p. 20-21 n. 5 contends Petitioner should be denied certiorari because he raises a free-standing

actual innocence claim that is not cognizable in federal court. However, this argument fails for three reasons:

1. Respondent never made this argument below and federal courts in Petitioner's case addressed his actual innocence because it was raised in the context of 28 U.S.C. § 2254. *See* Pet. App. A-D, I.

2. The *Herrera* concurrence suggests, various federal appeals courts have read it to suggest, and the Texas Court of Criminal Appeals has held, that such a claim implicates the due process clause of the United States Constitution. *See, e.g., Carriger v. Stewart*, 132 F.3d 463, 476-78 (9th Cir. 1997); *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1995); *Ex parte Elizondo*, 947 S.W.2d 202, 204 (Tex. Crim. App. 1996).

3. In granting certiorari on the second issue in *House*, this Court recognizes that a bare innocence claim may be cognizable.

II. Respondent improperly seeks to re-litigate the historical facts contrary to the State district court's findings after a full and fair hearing.

28 U.S.C. § 2254(e)(1) states in part that "a determination of a factual issue made by a State court shall be presumed correct," unless clear and convincing evidence rebuts this presumption. Federal courts must presume correct the State district court's explicit and implicit factual findings and credibility determination when the trial court held a full, fair, and live evidentiary hearing. *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Craker v. Procunier*, 756 F.2d 1212 (5th Cir. 1985). Federal courts

cannot reject the State district court unless they "conclude that the state [district] court's findings lacked even 'fair support' in the record." *See, e.g., Marshall v. Longberger,* 459 U.S. 422, 432-34 (1983).

The State district court held a full and fair live hearing, yet respondent improperly seeks to re-litigate (Respondent's Brief in Opposition at pp. 22-26) the historical facts contrary to the State district court's findings. Even the lower reviewing courts, although they ignored some of the State district court's findings of historical facts, did not challenge their accuracy. Pet. App. A-E, I. The State district court held a habeas corpus hearing that spanned several days and that included many exhibits and witnesses, including Petitioner, lead prosecutor Salinas, and the complainant and her family. Pet. App. F. Based on all of this evidence, along with the witnesses' demeanor, the State district court made extensive written factual findings and legal conclusions, replete with record citations and firmly supported in the record, finding Petitioner actually innocent. *Id.*

III. Respondent incorrectly contends that the complainant's perjury was merely collateral.

Respondent incorrectly contends that the complainant's perjury was merely collateral. This Court held in *Schlup* that "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." *Schlup*, 513 U.S. at 330. This Court has unanimously held that the "jury's estimate of the truthfulness and reliability of a given witness may

well be determinative of guilt or innocence . . . " *Napue v. Illinois,* 360 U.S. 264, 269 (1959).

The State district court found that the complainant's perjury, given the tenuous trial evidence, struck at the heart of the prosecution's case and proved Petitioner's innocence. Pet. App. F. In granting relief based on Petitioner's actual innocence, the State district court suggested that *all* of the complainant's trial testimony was false and that she lacked *all* credibility. *Id.* The State district court hardly considered this crucial evidence of perjury as just "a collateral matter," as the Court of Criminal Appeals and federal courts did and as Respondent does. *Id.* Further, Respondent fails to persuasively distinguish *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991), or *Richter v. Bartee*, 973 F. Supp. 1118 (D.Neb. 1997), examples of cases in which a lack of the complainant's credibility sufficiently proved the state petitioner's actual innocence.

IV. Respondent wrongfully claims that Petitioner failed to exercise *any* diligence in meeting the one-year limitations under AEDPA and that there is no appellate conflict regarding this limitations.

Respondent at p. 26-30 wrongfully claims that Petitioner failed to exercise *any* diligence in complying with the one-year deadline under the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. As Petitioner explained in his second amended federal habeas petition, he spent a great deal of time investigating, researching, and preparing a State habeas application, including:

1. Reading the 13-volume trial record.

2. Examining the investigative documents and photographs the prosecutor provided Petitioner regarding his case and the case of stepfather John Guerrero.

3. Reviewing Petitioner's appellate briefs and opinion.

4. Locating, investigating, and interviewing the trial participants.

5. Investigating and reviewing the Tarrant County criminal cases against stepfather John Guerrero that were filed as a result of the complainant and her brother's sexual abuse allegations.

6. Researching law from all federal jurisdictions and states, since Texas law regarding post-conviction actual innocence claims was unclear, if not contradictory, at the time. For example, while the Texas Court of Criminal Appeals in the 1996 case, *Ex parte Elizondo*, 947 S.W.2d at 202, granted relief in a habeas application based on the complainant's recant in a sexual assault case, the same court summarily denied relief a year later in a virtually identical case, *Ex parte Stevens*, 963 S.W.2d 75 (Tex. Crim. App. 1997).

If the habeas application had been filed earlier – without the proper factual or legal support – it risked being summarily denied and a subsequent habeas application barred under Texas Code of Criminal Procedure Chapter 11. Put differently, if Petitioner had filed a boilerplate or "bare bones" habeas application, or a habeas application based on specific facts and issues that had not yet been exhaustively researched, a possibility existed that

the trial court would have outright denied his habeas application, causing him to lose his "one bite at the apple."

Following the Court of Criminal Appeals' opinion and before filing his federal writ, Petitioner conducted an additional investigation, which he also set out in his second amended federal writ, including:

1. Locating, investigating, and trying to interview Darrin McMund, who contacted police while Petitioner's state habeas application was pending in the Court of Criminal Appeals. McMund told police that the complainant's mother and the complainant made up the allegations against Petitioner.

2. Following further investigative leads.

3. Hiring licensed polygrapher John Swartz to polygraph Petitioner.[1]

4. Locating, investigating, and interviewing jurors, including Percy Mitchell, who signed a seven-page affidavit that he would have acquitted Petitioner had he been aware of the new evidence of complainant's perjury.

5. Obtaining an updated affidavit from prosecutor Salinas re-affirming that Petitioner had an unfair trial.

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[1] Respondent at p. 29 incorrectly contends polygraphs are inadmissible in federal courts. *See, e.g., Gibbs v. Gibbs*, 210 F.3d 491, 499-00 (5th Cir. 2000); *Ulmer v. State Farm Fire & Cas. Co.*, 897 F.Supp. 299 (W.D. La. 1995).

Further, 28 U.S.C. § 2244(d)(1) states in relevant part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> * * *
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Obviously, Petitioner raises actual innocence as an exception to the one-year limitations because of the lower federal courts' finding that Petitioner discovered the factual predicate (the complainant's perjury) over a year before he filed his federal petition. To the extent that Respondent claims Petitioner failed to exercise *due* diligence, it is irrelevant in the context of Petitioner's claim of an actual innocence exception.

Finally, Respondent wrongfully claims at p. 30 n. 8 that no appellate conflict exists regarding whether actual innocence tolls or is an exception to the one-year limitations under AEDPA. Respondent concedes that the Sixth Circuit, in *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005), held that actual innocence tolls the one-year limitations under AEDPA. Other federal appellate courts, however, have implicitly or explicitly ruled regarding such an actual innocence exception, including:

1. The Tenth Circuit in *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003), held that "we have limited equitable tolling of the one-year limitations period to 'rare and exceptional circumstances. Therefore, [e]quitable

tolling would be appropriate, for example, when a prisoner is actually innocent . . . '" (citations omitted).

2. The First Circuit in *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003), held that "the statutory limit on filing initial habeas petitions is not mitigated by any statutory exception for actual innocence even though Congress clearly knew how to provide such an escape hatch . . . A couple of cases have conjectured that actual innocence might override the one-year limit; but to us these dicta are in tension with the statute and are not persuasive." (citations omitted).

3. The Fourth Circuit in *Rouse v. Lee*, 339 F.3d 238, 251-53 (4th Cir. 2003), held that the test for equitable tolling would not consider a petitioner's underlying claim, therefore foreclosing equitable tolling based on an actual innocence claim, and that equitable tolling only applies to AEDPA "when extraordinary circumstances beyond the petitioner's control prevent him from filing a timely petition."

4. The Seventh Circuit in *Gildon v. Bowen*, 384 F.3d 883, 887 (7th Cir. 2004), adopted the Eighth Circuit's approach in *Flanders v. Graves*, 299 F.3d 974 (2002), set out below, regarding an actual innocence exception.

5. An en banc Eighth Circuit in *Flanders*, 299 F.3d at 976-78, held:

   In the past, we have declined to address the question of whether a petitioner's 'actual innocence' is a circumstance sufficient to the toll the statute of limitations. Today, we hold that it is not, at least in the circumstances of